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Supreme Court of the United States

Misc. No. 248

KOICHI KIDO, TAKASUMI OKA, KENRYO SATO, SHIGETARO SHIMADA and SHIGENORI TOGO, citizens and nationals of Japan, appearing by their attorney and next friend, William Logan, Jr.,

Petitioners,

vs.

1. General of the Army Douglas MacArthur, individually and as General of the Army of the United States in the Military Occupied Territory of Japan and as Supreme Commander for the Allied Powers, 2. Lieut. General Walton H. Walker, individually and as Commander of the 8th Army of the United States in the Military Occupied Territory of Japan, 3. James V. Forrestal, individually and as Secretary of National Defense of the United States, and 4. Kenneth C. Royall, individually and as Secretary, Department of the Army of the United States, and 5. General Omar H. Bradley, individually and as Chief of Staff of the United States Army,

Defendants.

BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF *HABEAS CORPUS*

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IN THE

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Petitioners,

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Defendants.

BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF *HABEAS CORPUS*

This hearing is before the Court on an application by Petitioners for leave to file petitions for writs of *habeas corpus* and for writs of *habeas corpus*. Similar applications and petitions have been presented to this Court on behalf of KOKI HIROTA, Number 239 Misc., KENJI DOIHARA, Number 240 Misc., and HEITARO KIMURA, *et al.*, Number 267 Misc. Some of the Petitioners in these cases have been sentenced to death and the others have received sentences of imprisonment ranging from seven years to life under a judgment and finding of the International Military Tribunal for the Far East at Tokyo on November 12, 1948. AN appeal from the finding and judgment was denied by General

of the Army Douglas MacArthur on November 23, 1948. Petitioners request this Court to issue writs of *habeas corpus*, stay the execution of the sentences, discharge them from the custody of the defendants and restore them to their liberty.

Jurisdiction

Jurisdiction of this Court is invoked under the Constitution of the United States, Article 3, Section 2, Subdivision 2, the United States Code, 28 U. S. C. 341, 451-462, and the discretionary power inherent in this Court in this unprecedented case.

Questions Presented

1. Has this Court power to review by writ of *habeas corpus* acts of the Executive and military authorities thereunder unconstitutionally legislating international law?

2. Has this Court power under the Constitution and 28 U. S. C. 341, 451-462 to issue a writ of *habeas corpus* where a subject or citizen of a foreign state and domiciled therein is held in custody under and by virtue or color of authority of the United States for an act done or omitted to be done under the right, title, authority, privilege, protection and exemption claimed under the commission, order or sanction of a foreign state or under color thereof, the validity and effect whereof depend upon the Law of Nations?

3. Have the President of the United States and the military authorities the right to legislate offenses against the Law of Nations when such right is specifically delegated to the Congress by the express terms of the Constitution?

Statement of Facts

On December 1, 1943, the executive heads of the governments of the United States of America, Republic of China and the United Kingdom issued a statement at the Cairo Conference which reads in part as follows:

> "The Three Great Allies are fighting this war to restrain and punish the aggression of Japan." (Pet. 5)

On July 26, 1945, the executive heads of the same governments issued the Potsdam Declaration, which reads in part as follows:

> "The terms of the Cairo Declaration shall be carried out * * *" and "* * * stern justice shall be meted out to all war criminals including those who have visited cruelties upon our prisoners." (Pet. 7, 8)

On August 14, 1945, General of the Army Douglas MacArthur was appointed Supreme Commander for the Allied Powers by President Truman. (Pet. 12)

On September 2, 1945, the Instrument of Surrender was signed on board the *U. S. S. Missouri* which states in part as follows:

> "We hereby undertake for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders and take whatever action may be required by the Supreme Commander for the Allied Powers or by any other designated representative of the Allied Powers for the purpose of giving effect to that Declaration." (Pet. 9).

On September 6, 1945, a message prepared jointly by the Department of State, the War Department, and the

Navy Department and approved by the President, transmitted to General MacArthur through the Joint Chiefs of Staff, reads in part as follows:

> "1. The authority of the Emperor and the Japanese Government to rule the State is subordinate to you as Supreme Commander for the Allied Powers. You will exercise your authority as you deem proper to carry out your mission. Our relations with Japan do not rest on a contractual basis, but on an unconditional surrender. Since your authority is supreme, you will not entertain any question on the part of the Japanese as to its scope." and * * * "3. The statement of intentions contained in the Potsdam Declaration will be given full effect. It will not be given effect, however, because we consider ourselves bound in a contractual relationship with Japan as a result of that document. It will be respected and given effect because the Potsdam Declaration forms a part of our policy stated in good faith with relation to Japan and with relation to peace and security in the Far East." (See Appendix A.)

On September 6, 1945 the President of the United States approved a document prepared jointly by the Department of State, the War Department and the Navy Department on August 29, 1945 which states in part as follows:

> "Persons charged by the Supreme Commander or appropriate United Nations agencies with being war criminals, including those charged with having visited cruelties upon United Nations prisoners or other nationals, shall be arrested, tried and, if convicted, punished." (Occupation of Japan, Policy and Progress, The Department of State U. S. A., Publication 2671, Far Eastern Series 17.)

On December 27, 1945, the Foreign Ministers of the United States of America, the United Kingdom and the Union of Soviet Socialist Republics agreed, with the cor-

currence of China, for the establishment of an Allied Council for Japan, part of which reads as follows:

> "5. The Supreme Commander shall issue all orders for the implementation of the Terms of Surrender, the occupation and control of Japan, and directives supplementary thereto. In all cases action will be carried out under and through the Supreme Commander who is the sole executive authority for the Allied Powers in Japan. He will consult and advise with the Council in advance of the issuance of orders on matters of substance, the exigencies of the situation permitting. His decisions upon these matters shall be controlling." (See Appendix B.)

The Joint Chiefs of Staff issued a directive to General of the Army Douglas MacArthur as Supreme Commander for the Allied Powers defining war crimes as including "crimes against peace," "crimes against humanity," "conspiracy to commit same" and "conventional war crimes" and granting to him:

> "* * * power (a) to appoint special international military courts (which term shall be held to mean tribunals of any kind), composed of military or naval officers or civilians of two or more of the United Nations, for the trial, under any applicable law, domestic or international, including the laws and customs of war, of Far Eastern war criminals where the alleged offenders are, in the Supreme Commander's opinion, appropriately to be tried by an international court; and (b) to prescribe or approve rules of procedure for such tribunals. The appointment of any such international court will be discussed by the Supreme Commander or his designated representative in advance with the appropriate local officers or representatives of each nation to be represented upon such a court and fair arrangements will be made for appropriate representation of each such nation upon the court. No such officer or civilian will be appointed to serve upon such a court without the approval of the local commander of the forces of his nation or such other officials as any nation may pre-

scribe to give such approval for its own nationals. In the appointment of any such international court and in all trials before it, the international character of the court and of the authority by which it is appointed should be properly recognized and emphasized, particularly in dealings with the Japanese people. Until further authorization by the Joint Chiefs of Staff, no international court for the trial of persons charged with offenses of the type described in paragraph 1. A. above will be established by the Supreme Commander. In submitting any plan for the appointment of such a court, you should specify the particular offenses and alleged offenders to be tried before the court and the nature of the coordination of the plan effected by you on a military level with representatives of the nations to be represented upon the court. * * *" (Appendix "D", Draft, Joint Chiefs of Staff, Directive on the Identification, Apprehension and Trial of Persons Suspected of War Crimes—JCS 1512.)

On January 19, 1946, General of the Army Douglas MacArthur and Supreme Commander for the Allied Powers, issued a Special Proclamation for the establishment of an International Military Tribunal for the Far East (Pet. 11-13) and on the same day promulgated the Charter of the International Military Tribunal for the Far East. (Pet. 13.)

On February 15, 1946, General of the Army Douglas MacArthur appointed the various nominees of their respective countries of the members of the Far Eastern Commission to be judges of the International Military Tribunal for the Far East. (Pet. 21-22.)

On April 3, 1946 the Far Eastern Commission issued a *policy decision* which, among other things, defined "crimes against peace," "crimes against humanity," "conspiracy to commit same" and "conventional war crimes." It also mentioned the Supreme Commander's power to establish international military courts, the appointment by the Su-

preme Commander of judges nominated by each state on the Far Eastern Commission to participate in the work of such court and a review of the decisions of such courts by the Supreme Commander. The wording of this policy decision is practically identical with the previous directive issued to General of the Army Douglas MacArthur by the Joint Chiefs of Staff of the United States. (Appendix "D" Draft, Joint Chiefs of Staff, Directive on the Identification, Apprehension and Trial of Persons Suspected of War Crimes—JCS 1512.) (See Appendix C.)

On April 26, 1946 General of the Army Douglas MacArthur issued General Order Number 20 amending the Charter of the International Military Tribunal for the Far East. (Ret. 13-21.)

All petitioners pleaded not guilty to the indictment which contained fifty-five counts charging various crimes during the period of time from January 1, 1928 to September 2, 1945. The indictment included counts charging "crimes against peace," "crimes against humanity," "conspiracy to commit same" and "conventional war crimes." After two years of taking evidence and on November 12, 1948 the Tribunal rendered a majority finding and judgment. Petitioners in the instant case were found guilty only of "crimes against peace," and acquitted of all the other charges. Major General Myron C. Cramer, appointed by General of the Army Douglas MacArthur as a judge representing the United States of America, was one of the judges constituting the majority.

On November 23, 1948 defendant General of the Army Douglas MacArthur denied the appeals of petitioners and issued an order commanding defendant Lieut. General Walton H. Walker, an officer of the United States Army, to carry out the sentence as pronounced by the Tribunal and affirmed by General of the Army Douglas MacArthur as Supreme Commander for the Allied Powers. Petitioners at the present time are being detained in Sugamo Prison,

Tokyo, by the officers and men of the 8th Army of the United States. Some of the Petitioners here and those in the companion petitions were civilian ministers of state and others officers in the military branch of the Japanese Government.

Of the eleven judges who presided at the Tribunal, Mr. Justice PAL of India, Mr. Justice ROLING of the Netherlands and Mr. Justice BERNARD of France dissented from the judgment of the Tribunal. Sir William Webb, President of the Tribunal, wrote a separate dissenting opinion suggesting imprisonment rather than hanging for the seven sentenced to death.

POINT I

This Court has jurisdiction to issue writs of *habeas corpus* to these petitioners.

These petitions raise questions which on the surface may appear to indicate a request to have this Court interfere with delicate affairs of an international nature. This Court is not called upon to review the acts of other countries. Fundamentally, however, the issues are of a momentous national character involving as they do the power and authority of the Executive branch of the United States Government and the military authorities thereunder regarding Petitioners which this Court in the interests of the United States and in the interest of engagements with other nations should resolve. These interests transcend international expediency.

In the determination of the question of the jurisdiction of this Court to grant the relief requested by Petitioners, consideration first must be given to the question of whether the International Military Tribunal for the Far East was

in fact and in law an international court or in reality a creation and enterprise of the Executive of the United States and the military authorities thereunder.

(A) The history of the International Military Tribunal for the Far East shows that it was constituted under color of the authority of the United States of America

Whatever power the International Military Tribunal for the Far East possessed originated and stemmed from the Executive authority of the United States and not from any international treaty. This branch of the United States Government with the concurrence of the military authorities gave birth to the Tribunal and clothed it with authority prohibited by the Constitution and laws of the United States, as will be hereinafter shown.

It is the Petitioners' contention that the acts of the United States were never ratified by the Allied Nations. Their actions to have any international validity require an international treaty solemnly arrived at as such. The nations in the past, although attempts were made at numerous times, were never able to agree even at a definition of the term "aggressive war". There never has been any international treaty defining "crimes against peace," "crimes against humanity," and "conspiracy to commit them", as pointed out by Mr. Justice ROLING, member from the Netherlands, in his dissenting opinion, where he carefully reviewed the development of international law through the Treaty of Versailles, the Pact of Paris, the Treaty of Mutual Assistance, the Geneva Protocol, Assemblies of the League of Nations and concluded:

> "From the above, it follows that 'crimes against peace' were not regarded true crimes before the London Agreement, and were not considered as such before the end of 1943.
>
> . . . .

> "As indicated above, aggression was not considered a true crime before and in the beginning of this war, and could not be considered as such for lack of those conditions in international relations on which such a view could be based."

We submit that it can not now be seriously contended that this was accomplished by the Far Eastern Commission. The representatives of this commission were never clothed with any such authority by their respective countries. Yet it is claimed that this has been achieved in this trial, although the majority of the judges have found themselves without power to determine for themselves what is the applicable international law holding that they were bound by the definition of laws and crimes as set forth in the Charter promulgated by General of the Army Douglas MacArthur.

It can not seriously be contended that the pronouncements at the Cairo Conference and the Potsdam Declaration constituted treaties. They were merely unilateral expressions of might or intentions. As was said by Mr. Justice PAL, member from India, in his dissent from the majority opinion of the Tribunal:

> "*These declarations are mere announcements of the intention of the Allied Powers.* They have no legal value. They do not by themselves give rise to any legal right in the United Nations. The Allied Powers themselves disown any contractual relation with the vanquished on the footing of these Declarations. (Vide Paragraph 3 of the authority of the Supreme Commander.)"

The appointment of General of the Army Douglas MacArthur as Supreme Commander for the Allied Powers on August 14, 1945 was strictly a United States national executive act as was the directive to him on September 6, 1945 authorizing him to exercise his authority as he deemed proper to carry out his mission as Supreme Commander for the Allied Powers.

The Instrument of Surrender is not an international treaty and it can not be contended that any international court established thereunder would attain validity under the Law of Nations. Mr. Justice PAL, member from India, in his dissenting opinion quoted Professor Hans Kelsen of the University of California, who said:

> "If individuals shall be punished for acts which they have performed as acts of state, *by a court of another state, or by an international court*, the legal basis of the trial, as a rule, *must be an international treaty* concluded with the state whose acts shall be punished, *by which treaty* jurisdiction over these individuals is conferred upon the national or international court." (Italics ours.)

Mr. Justice PAL stated:

> "*Here there is no such treaty;* and the terms of authority of the Supreme Commander make it expressly clear that any power conferred on him is not in any way derived from the vanquished through any contractual relationship.
>
> "From what has been stated above it seems amply clear that if the *Allied Powers as victors have not, under the international law, the legal* right to treat such persons as war criminals, they have not derived any such right by a treaty or otherwise. The Allied Powers have nowhere given the slightest indication of their intention to assume any power which does not belong to them in law."

In the Special Proclamation issued by defendant General of the Army Douglas MacArthur on January 16, 1946 for the establishment of the International Military Tribunal for the Far East, the Potsdam Declaration and the Instrument of Surrender are relied upon by him as the basis for his international authority. Since these documents are not international treaties, the Charter for the International Military Tribunal for the Far East which he promulgated on the same day was void of international legality.

The Moscow Agreement of December 26, 1945, also mentioned in the Special Proclamation, merely authorized General of the Army Douglas MacArthur as Supreme Commander for the Allied Powers to issue orders to implement the Terms of Surrender. Neither the Far Eastern Commission which issued its policy decision on April 3, 1946 nor the Allied Council was a legislative body authorized to legislate international penal laws. There was an absence of either an international constitution in fact or in law and an international legislature in fact or in law authorized to establish the International Military Tribunal for the Far East and define international crimes.

The judges were not appointed to the Tribunal by their respective governments. They were nominated by their governments but the actual appointment to the Tribunal was made by General of the Army Douglas MacArthur as Supreme Commander for the Allied Powers. General of the Army Douglas MacArthur was free under Executive directive to appoint these nominees of the Allied Nations or some one else. As was said by Mr. Justice JARANILLA, member from the Republic of the Philippines, in his opinion concurring with the majority:

> "He could have created only a military commission composed of officers belonging to one nation. * * *"

The investigations and the accumulation of evidence were conducted in the main by American attorneys and investigators. The Chief Prosecutor was a United States citizen, employed solely by the United States Government. He was not appointed by the Allied Nations. A large staff of United States prosecuting attorneys was employed by the United States Government—not by any international body. The prosecuting attorneys of other nations were permitted to participate in the proceedings under the guidance, orders and direction of the Chief Prosecutor but not

pursuant to the terms of any international treaty. American attorneys were also employed by the United States War Department to assist Japanese counsel for the defense. They were not employed by any international body nor did any other nation provide defense attorneys for the accused.

Another instance of the lack of internationality of the Tribunal is the amended Charter itself which provides that sentence is to be carried out in accordance with the orders of the Supreme Commander for the Allied Powers who may at any time, approve, reduce or otherwise alter the sentence except to increase its severity. No participation in the review by any of the Allied Powers is provided for in the amended Charter.

(B) This Court has the power to issue writs of *habeas corpus* in this case

The Constitution of the United States is a living instrument. In keeping with changing conditions it should be so interpreted by this Court. Restricted, narrow and technical interpretations stifle justice. There are no limitations in the Constitution or Congressional acts warranting a rejection by this Court of the writs prayed for by petitioners. Judge STORY recognized the purposes and objects of our founding fathers when they adopted the Constitution in saying in *Martin* v. *Hunter*, 1 Wheaton 304:

> "The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen

what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which at the present might seem salutary, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom and the public interests should require."

The Constitution of the United States, Article 3, Section 2, Subdivision 2 states:

"In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The United States Code, as amended in 1925, provides:

28 USC 451

"The Supreme Court and the District Courts shall have power to issue writs of habeas corpus."

28 USC 452

"Power of judges. The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. * * *"

28 USC 453

"The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof or is in custody for an act done or omitted in pursuance of a law of the United States, or of an

order, process, or decree of a court or judge thereof or is in custody in violation of the Constitution or of a law or treaty of the United States; or, *being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations;* or unless it is necessary to bring the prisoner into court to testify." (Italics ours.)

The facts of the present case fit squarely within these provisions of the Code. This Court has held:

> "The definite aim of the 1925 Act was to enlarge, not to destroy the Court's discretionary jurisdiction." (Ex Parte Peru, 318 U. S. 578.)

The compelling reason for the issuance of the writs requested is succinctly stated in *Ex Parte Steiwart* (47 Fed. Sup. 410, 412).

> "For it is the function of the writ of habeas corpus to question the right of any agency of the Government to deprive a person of his liberty at any stage when a person is put under restraint by an authority, the legitimacy of which, *or of the effects of which*, he challenges. Constitution of the United States, Art. I, Sec. 9, Clause 2; 28 U. S. C. A. Sec. 453; In re Neagle, 1890, 135 U. S. 1, 40-43, 10 S. Ct. 658, 34 L. Ed. 55; Mooney v. Holohan, 1935, 294 U. S. 103, 113, 55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406; Johnson v. Zerbst, 1938, 304 U. S. 458, 465, 58 S. Ct. 1019, 82 L. Ed. 1461 McNally v. Hill, 1934, 293 U. S. 131, 55 S. Ct. 24, 79 L. Ed. 238; Bowen v. Johnston, 1939, 306 U. S. 19, 26, 59 S. Ct. 442, 83 L. Ed. 455 Walker v. Johnston, 1941, 312 U. S. 275, 61 S. Ct. 574, 85 L. Ed. 830; Smith v. O'Grady, 1941, 312 U. S. 329, 331 61 S. Ct. 572, 85 L. Ed. 859; Holiday v. Johnston, 1941, 313 U. S. 342, 350, 550, 61 S. Ct. 1015, 85 L. Ed. 1392; Waley v. Johnston, 1942, 316 U. S. 101, 62 S. Ct. 964, 86 L. Ed. 1302;

Angelus v. Sullivan, 2 Cir., 1917, 246 F. 54, 64. Absent congressional action, the writ cannot be denied even in wartime. See Ex parte Milligan, 1866, 4 Wall. 2, 125, 18 L. Ed. 281; Ex parte Quirin et al., 63 S. Ct. 1, 87 L. Ed. . . ., decided July 31, 1942."

The proper exercise of power by the Executive and Joint Chiefs of Staff being questioned in these proceedings necessitates action by this Court. Mr. Chief Justice HUGHES said in *Bowen* v. *Johnston* (306 U. S. 19):

> "It must never be forgotten that the writ of *habeas corpus* is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired. *Ex parte Lange, supra.* The rule requiring resort to appellate procedure when the trial court has determined its own jurisdiction of an offense is not a rule denying the power to issue a writ of *habeas corpus* when it appears that nevertheless the trial court was without jurisdiction. The rule is not one defining power but one which relates to the appropriate exercise of power. It has special application where there are essential questions of fact determinable by the trial court. *Rodman* v. *Bothick, supra.* It is applicable also to the determination in ordinary cases of disputed matters of law whether they relate to the sufficiency of the indictment or to the validity of the statute on which the charge is based. *Id.; Glasgow* v. *Moyer, supra; Henry* v. *Henkel, supra.* But it is equally true that the rule is not so inflexible that it may not yield to exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent."

See also:

Ex parte Burrus, 136 U. S. 586.

This Court has jurisdiction on the ground that the International Military Tribunal for the Far East is in fact a court created by executive order of the United States

dicts military authorities and it has jurisdiction to issue its of habeas corpus to review the actions of the esident and military officials of the United States Gov- nment. The present application is of major public im- rtance warranting the exercise of discretion by this urt to issue the writs.

"In view of the public importance of the ques tions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we con- sider and decide those questions without any avoid- able delay, we directed that petitioners' applications be set down for full oral argument at a special term of this Court, convened on July 29, 1942." (Ex parte Quirin, 317 U. S. 1)

There is no federal court such as our Federal District urt functioning in the Military Occupied Territory of pan to which petitioners can apply. Therefore, unless s Court takes jurisdiction, petitioners have no other al recourse for *habeas corpus*. There is of course the ssibility of instituting a different type of ancillary pro- ding in a district court. The effect of this, however, uld be to bring before this Court by *certiorari* the iden- al matters which are now being expounded. Such proce- re would hardly be compatible with the need for imme- fe action in this unprecedented situation.

A petition for a writ of prohibition and or mandamus s been granted by this Court in a matter of public im- rtance and exceptional character. (*Ex parte Peru*, U. S. 578.) Certainly an application for a writ of *eas corpus* in the present case should receive equal if greater consideration. The majority of the Court, aking through Mr. Chief Justice STONE, in holding that Court had jurisdiction, reviewed its powers to issue

writs of *scire facias*, *habeas corpus* and prohibition and said:

> "We conclude that we have jurisdiction to issue the writ as prayed. And we think that—unless the sovereign immunity has been waived—the case is one of such public importance and exceptional character as to call for the exercise of our discretion to issue the writ rather than to relegate the Republic of Peru to the circuit court of appeals, from which it might be necessary to bring the case to this Court again by certiorari. The case involves the dignity and rights of a friendly sovereign state, claims against which are normally presented and settled in the course of the conduct of foreign affairs by the President and by the Department of State."

See also:

Ex Parte Virginia, 100 U. S. 339.

Just as individuals in the conduct of their every day affairs, and public officials carrying out their duties in the various political subdivisions of the United States, must abide by the Constitution and laws of the United States at their own risk, so too must the Executive and the military authorities representing the United States Government be held legally responsible to perform their duties in a Constitutional manner and under the law of the land in their engagements with foreign powers. All such acts are subject to judicial scrutiny at a later date in a proper case.

POINT II

The result of the action of the International Military Tribunal for the Far East is that the President and military authorities of the United States have, without Congressional approval, created offenses against the Law of Nations.

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." (Const. of the U. S. Art. VI)

Clearly then, the fundamental law of the land is of three sources. Executive agreements of the President of the United States do not constitute the fundamental law of the land.

> "The Congress shall have Power . . . to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." (Const. of U. S. Art. I, Sec. 8, Clause 10)

> "Congress and the President like the Courts possess no power not derived from the Constitution." (Ex Parte Quirin, 317 U. S. 1, 25, 63 Sup. Ct. 2.)

The offense known as "crimes against peace" used as the basis of the charges in Nurnberg and Tokyo never existed heretofore as an offense against the Law of Nations. The Kellogg-Briand Pact or any other treaty or agreement between nations provided for no individual punishment for war defined as aggressive.

It was held in *Ex Parte Vallandigham*, 1 Wall. 243, 249:

> "It is affirmed in these instructions [orders of Secretary of War on 24 April 1863], that military juris-

diction is of two kinds. First, that which is conferred and defined by statute; second, that which is derived from the common law of war."

Said the Supreme Court in *Ex Parte Quirin, supra*:

> "It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions." (p. 29)

The Supreme Court recognized the worthiness of the allegation that Congress has the power to define offenses against the Law of Nations when, in *Ex Parte Quirin*, it answered the proposition by ruling that Congress through the Articles of War had incorporated by reference as within the jurisdiction of military commissions all offenses which are defined as such by the law of war. If the reasoning of the Supreme Court in *Ex Parte Quirin*, that Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals, be applied here in the instant case, it is readily observable that both are lacking for there is neither a common law of war which defines "crimes against peace" or definite statutes crystallizing said offense in permanent form.

> "The core of the Court's power to declare void acts of the legislature if inconsistent with the Constitution is based upon equality and independence of the judiciary—not superiority." (The Federalist (1818 Ed.) No. LX XVIII, p. 421, and statement of Hamilton therein.)

> "The authority of a court to restrain or hold in check executive power cannot be considered less important than the right to ignore unconstitutional legislative action." (MacLaughlin Cons. History of the U. S. p. 319.)

The Court has early in its history declared its right to hold unconstitutional legislative acts of the Congress (*Marbury v. Madison*). Said the Court in *Van Horne's Lessee v. Dorrance* (also cited PATTERSON), 2 Dallas 304, 309 (1795):

> "If a legislative act opposes a constitutional principle, the former must give way, and be rejected on the score of repugnance. . . . It is an important principle, which, in the discussion of questions of the present kind, ought never to be lost sight of, that the Judiciary on the contrary is not a subordinate, but coordinate, branch of the government."

There is no reason to believe, that upon factual provocation and the existence of a justiciable controversy, this Court may not so act in regard to unconstitutional executive acts.

Said T. M. Cooley, General Principles of International Law (p. 203, 4th ed.):

> "But when he (the President) exceeds his authority, or usurps that which belongs to one of the other departments, his orders, commands, or warrants protect no one, and his agents become personally responsible for their acts. The check of the courts, therefore, consists in their ability to keep the Executive within the sphere of his authority by refusing to give the sanction of the law to whatever he may do beyond it, and by holding the agents and instruments of his unlawful action to strict accountability."

The Supreme Court of the United States isolated the question involved in the *Ex Parte Quirin* case, saying:

> "We are concerned only with the question whether it is within the constitutional power of the National Government to place petitioners upon trial before a military commission for the offenses with which they are charged" (p. 25).

Here we are concerned only with the question of whether it is within the constitutional power of the Executive to agree with other nations to place petitioners upon trial before a military tribunal composed of representatives from several countries, for the offenses with which they are

charged. We must therefore first inquire whether any of the acts charged is an offense against the Law of Nations cognizable before a military tribunal of our own country. For certainly, that which we cannot lawfully do alone cannot by the means here employed become legal by its performance in conjunction with other nations.

Said the Court further, in *Ex Parte Quirin*, *supra*, at page 29:

> "We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunals here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by jury."

If we move the *situs* of this trial to Washington, D. C., before a purely American military commission, the most ardent advocate of the legality of "crimes against peace" would hardly contend that such could be charged as an offense against the petitioners. Yet fundamentally wherein does the current factual situation invite departure from this concept. It is the international complexion that encourages the proponents of the offense of "crimes against peace" to take their position regarding the legality thereof. Again we must advance the reasoning that an act not lawful if done by America alone, at least in the absence of treaty, or other legislative sanction, cannot become lawful when done in conjunction with other nations.

It is true that the Executive and Senate perhaps may do by treaty what the Congress of the United States could not have done through legislative enactment, and the test of the validity of a treaty is not the power of the government to do the same thing by an act of Congress (*State of Missouri* v. *Holland*, 40 Sup. Ct. 382, 252 U. S. 416). But even a treaty is invalid if in violation of or inconsistent with the Constitution (Butler on Treaties, Vol. II, par. 455,

p. 350; Crandall on Treaties, 2nd ed. p. 208; Fed. Stat. Ann. Vol. IX, p. 28; *Cherokee Tobacco* case, 11 Wall. 616, 20 L. Ed. 227; *U. S. v. Old Settlers*, 148 U. S. 427, 13 Sup. Ct. 650). "And this being true, the Court, in a proper case where the rights of citizens are involved, may so declare" (Michie's Ency. of U. S. Sup. Ct. Reports, Vol. XI, 640; *Head Money* Cases, 112 U. S. 580-598, 5 Sup. Ct. 247; *Ex parte Cooper*, 143 U. S. 472, 501-503; 12 Sup. Ct. 453; *Jones v. Meehan*, 175 U. S. 1, 20 Sup. Ct. 1; Also see *De Geofroy et al. v. Riggs, et al.*, 133 U. S. 258, 10 Sup. Ct. 295; 33 L. Ed. 642 for definition of limits of treaty-making powers as controlled by the Constitution).

There must be a justiciable controversy before the Court can act (*Kiyoshi Hirabayashi v. U. S.*, 63 Sup. Ct. 1375; 320 U. S. 81; 87 L. Ed. 1774 and also see 320 U. S. 707, 88 L. Ed. 414). Here we have a justiciable controversy unique and demanding in its nature, loudly proclaiming the need for judicial solution.

> "No doubt the courts should retain the power of review of governmental action to prevent the expansion of the executive power unwarranted by statute." (Ispass v. Pyramid Motor Freight Corp., 54 F. Supp. 565, 566.)

Until the filing of these petitions before the Supreme Court of the United States, it may have been considered purely a political matter; an arrangement between countries to try the defeated leaders. But as was said in *Rhode Island v. Massachusetts*, 12 Pet. 657, 737, involving a dispute over a boundary line between the states:

> "From the time of such submission, the question ceases to be a political one, to be decided by the *sic volo sic jubeo*, of political power."

In the case of *Mississippi v. Johnson*, 4 Wall. 475, 500, 18 L. Ed. 437, the question involved *was not* whether the President could be restrained from carrying out an act instigated and originally conceived by him, which was

claimed to be contrary to the Constitution (as in the instant case), but was "Can the President be restrained by injunction from carrying into effect an *act of Congress* alleged to be unconstitutional?" Chief Justice CHASE said:

> "The Congress is the Legislative Department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; *though the acts of both, when performed, are, in proper cases, subject to its cognizance*" (1, c. 441). (Italics ours.)

All orders of the President, or of the Secretary of War, issued under his authority, whether given by virtue of his constitutional office as Commander-in-Chief are, as statutory powers, of the full force of law (*U. S. v. Freeman*, 3 How. 556; *Smith v. Whitney*, 116 U. S. 167).

> "But in all cases those orders must, if issued by virtue of authority congressionally given, pursue the terms of the granting statute; and if issued by virtue of his constitutional authority, be in accordance with the generally accepted principles of international law and custom. When this is not done they will not justify the acts of subordinates acting under them." (Willoughby Const. Law of the U. S. p. 656, citing Little *v.* Barreme, 2 Cranch 170.)

Nor is it an answer to rely upon the war powers and the conduct and control of foreign affairs vested in the Executive, for no one could contend that the exercise of such powers, unhampered and discretionary as they may necessarily be during war, includes the right and power to legislate and define new and unrecognized crimes and to try petitioners thereunder and charge them with offenses not even within the contemplation or scope of the Potsdam Declaration and the Instrument of Surrender.

In *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 156, the Court said:

> "The war power of the United States like its other powers and the police power of the States, is subject to applicable constitutional limitations."

The Supreme Court of the United States has often declared, in unmistakable terms, that there can be no crime against the authority of the United States except where the forbidden act is defined and penalized by statute. (*U. S. v. Hudson*, 7 Cranch 32, 34.) Said the Court:

> "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."

See also *U. S. v. Coolidge, et al.*, 1 Wheat. 415; 4 L. Ed. 124.

In *Field v. Clark*, 143 U. S. 649; 12 Sup. Ct. 495, 504; 36 L. Ed. 294, it was said:

> "That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."
>
> "It is fundamental that the citizen has the right to rely upon the statutes of the United States for the ascertainment of the acts which constitute an infraction of its law." (U. S. v. Mathews, D. C. 146 Fed. 306, 308, citing Sup. Ct. Case in Re Kollock, 165 U. S. 533; 41 L. Ed. 813)

It is unquestioned that the legislative functions of Congress may not be delegated by Congress to any executive or executive department (*Fahey v. Mellonnee*, 332 U. S. 245, 67 Sup. Ct. 1552, 91 L. Ed. 2030, reversing 68 Fed. Sup. 418).

The right of the Congress of the United States and individual members thereof to rely on preexisting international law such as that expressed and contained in the notes of the United States accompanying the execution and ratification of the Pact of Paris of 1928 regarding the question of resort to war in self defense is usurped by the Executive and military commitments of the United States through participation in and adherence to the law announced by said Tribunal. The majority ruling of the International

Military Tribunal for the Far East, adhered to by the American Justice thereof, decreed:

> "The right of self-defense does not confer upon the state resorting to war, the authority to make a final determination upon the justification of its action."

Prior to this time and through express provision of the Constitution of the United States the Congress was delegated the duty of declaring war and of determining for itself what factual situation gave rise to a war of self-defense. The deprivation of the immunity granted individual members of Congress under existing international law in deciding on the need for war has been nullified without their consent and hence is unconstitutional and void.

POINT III

The failure to comply with the Constitution of the United States and recognized principles of International Law has resulted in further abuses of justice.

Can this Court countenance the judgment of a court which is a creation and enterprise of the Executive and the military authorities, pursuant to a charter which deprived Petitioners of a fair and impartial trial? In declaring "crimes against peace," "crimes against humanity" and "conspiracy to commit them" to be crimes coming within the jurisdiction of the International Military Tribunal for the Far East, and defining these crimes the Charter foreclosed an examination by the members of the Tribunal as to whether or not these were and are international crimes. Their opinion that they were so foreclosed, resulted in the majority opinion. Mr. Justice PAL, member from India, in his dissenting opinion stated:

> "The so-called trial held according to the definition of crime *now* given by the victors obliterates

the centuries of civilization which stretch between us and the summary slaying of the defeated in a war. A trial with law thus prescribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge. It does not correspond to any idea of justice. Such a trial may justly create the feeling that the setting up of a tribunal like the present is much more a political than a legal affair, an essentially political objective having thus been cloaked by a juridical appearance. Formalized vengence can bring only an ephemeral satisfaction, with every probability of ultimate regret; but vindication of law through *genuine legal process* alone may contribute substantially to the re-establishment of order and decency in international relations."

Mr. Justice PAL also stated:

"It is therefore pertinent to inquire what is the extent of *the lawful authority of a victor* over the vanquished in international relations. I am sure no one in this Twentieth Century would contend that even now this power is unlimited in respect of the person and the property of the defeated. Apart from the right of reprisal, the victor would no doubt have the right of punishing persons who had violated the laws of war. But to say that the victor can define a crime at his will and then punish for that crime would be to revert back to those days when he was allowed to devastate the occupied country with fire and sword, appropriate all public and private property therein, and kill the inhabitants or take them away into captivity. When international law will have to allow a victor nation thus to define a crime at its will, it will, like David Low's 'Peace', be surprised to find itself back on the same spot whence it started on its apparently onward journey several centuries ago. Perhaps humanity also will feel the same inward surprise though it may be civilized enough not to give any outward expression of the same."

The resulting acts of the Executive and Chiefs of Staff in defining the crimes and the limitations placed on the

Tribunal in the Charter executed by General of the Army Douglas MacArthur were also seriously questioned by Mr. Justice ROLING, member of the Netherlands, in his dissenting opinion:

> "Consequently, according to the majority judgment, the Tribunal, though called upon to mete out justice, is not the authority called upon to judge whether the victorious powers have stayed within the limits of international law. Members of an International Tribunal, therefore, could only refuse office or resign in case they regard the Charter as trespassing those limits, and leave their places to judges prepared to share the views as set out in the Charter.
>
> "This standpoint seems to be not only dangerous for the future, but incorrect at this moment.
>
> "It would be the worst possible service this Tribunal could render to the cause of international law if it should establish as a rule that an international tribunal, *called upon to mete out justice*, would have to apply the rules laid down by the Supreme Commander of the victorious nations, without having either the power or the duty to inquire whether it was applying rules of justice at all."

He also stated:

> "If it is correct to state that victorious powers have no authority to create new international crimes, but are bound by the provisions of existing international law, it follows that the Charter cannot decide the questions of whether a certain act or failure to act is a crime, but only whether a certain crime, acknowledged in international law, *comes within the jurisdiction of the Tribunal*. There can be no question of a Charter *making* certain activities criminal.*
>
> "Victorious powers may convene a Tribunal, may promulgate rules for its procedure, and may deter-

* "As, apparently, the majority judgment holds. Discussing the conspiracy to commit conventional war crimes, the judgment declares that 'conspiracies to commit such crimes are not made criminal by the Charter of the Tribunal' " (Judgment, p. 34).

> mine which acts or 'omissions' the Tribunal shall have the power to try and punish. It is the Tribunal which is called upon to decide whether those acts or 'omissions' are crimes under international law."

Mr. Justice BERNARD, member from France, said in his dissenting opinion:

> "From the above quoted statement, it must be concluded that according to the majority a substantive law is furnished by the Charter, that this substantive law is the one to be applied to the judgment of the Accused and that the Tribunal could not for any reason whatsoever refuse to apply it."

In the first sentence of the proclamation for the establishment of the International Military Tribunal for the Far East, General of the Army Douglas MacArthur recorded:

> "WHEREAS, the United States and the nations allied therewith in opposing the illegal wars of aggression of the Axis nations * * *."

This proclamation also foreclosed the members of the International Military Tribunal for the Far East from finding that Japan did not wage an aggressive war. By imposing upon the Tribunal two determinations,

1. that Japan waged an aggressive war and
2. that aggressive war is a crime,

the Tribunal was not free to make its own findings on these issues to the prejudice of Petitioners.

No citation of authority is needed to support the well-known practice of Anglo-Saxon courts to permit challenges for cause to be made to the judges, yet challenges to the individual members sitting on the International Military Tribunal for the Far East were prohibited on the theory that the Constitution of the Tribunal and the appointment of the respective justices had been directed by General of

the Army Douglas MacArthur, Supreme Commander for the Allied Powers.

Petitioners were deprived of a fair and impartial trial in that the indictment which was returned contained charges against the Petitioners relating to an alleged conspiracy and acts committed from January 1, 1928 to September 2, 1945. The Potsdam Declaration and the Instrument of Surrender can be read in vain for any indication that Petitioners were to be tried for any acts prior to December 7, 1941. Japan was not at war with any of the Allied Nations prior to December 7, 1941, unless we consider the undeclared war with China as being a war and several small border incidents with Russia, which were settled by treaty between Japan and Russia. Yet, Petitioners were tried and convicted for acts committed during two decades in which seventeen different cabinets rose and fell in Japan. Mr. Justice PAL in his dissenting opinion said:

> "The first substantial objection relating to the jurisdiction of the Tribunal is that the *crimes triable by this Tribunal must be limited to those committed in or in connection with the war which ended in the surrender* on 2 September 1945. In my judgment this objection must be sustained. It is preposterous to think that defeat in a war should subject the defeated nation and its nationals to trial for all the delinquencies of their entire existence. There is nothing in the Potsdam Declaration and in the Instrument of Surrender which would entitle the Supreme Commander or the Allied Powers to proceed against the persons who might have committed crimes in or in connection with any other war." . . .
>
> "In my opinion, therefore, crimes alleged to have been committed in or in connection with any conflict, hostility, incident or war not forming part of the war which ended in the surrender of the 2nd September, 1945 are outside the jurisdiction of the Tribunal."

The unfairness and prejudice to these Petitioners of the Tribunal in its majority opinion finding them guilty of

crimes for acts performed on behalf of the Japanese Government prior to December 7, 1941 is also succinctly set forth by Mr. Justice Roling, member for the Netherlands, in his dissenting opinion:

"From the Potsdam Declaration follows not only the limitation of the jurisdiction as to the offenses, but also a restriction as to persons. In the Potsdam Declaration are given the conditions on which 'Japan shall be given an opportunity to end this war.' One of these conditions was the meting out of stern justice to war criminals. It follows that our Charter can refer only to war criminals of *this war*, i.e., the war which led to Japan's surrender as formulated in the Instrument of Surrender. Consequently, this Tribunal has no jurisdiction to deal with war crimes committed in other wars, even if those wars happened to have been fought in the Far East and even if the perpetrators could thus also, in a wider sense, be referred to as 'major war criminals in the Far East,' (Charter, art. 1) or as 'Far Eastern War Criminals' (Charter, art. 5).

"This restriction to war crimes committed in the Pacific War is also indicated by the fact that the Charter was given by the Supreme Commander of the Allied Powers which fought the Pacific War, and that the members of the Tribunal and of the prosecution staff are representatives of the nations who were signatories to the Instrument of Surrender, together with representatives of two nations which participated in that war but were not signatories to the Instrument of Surrender because they had not, at that moment, achieved national independence.

"This restriction follows also from the above-mentioned Special Proclamation of the Supreme Commander, by which the Tribunal was constituted and which gives as one of the considerations on which the Charter is based:

> 'Whereas the United States and the Nations allied therewith, in opposing the illegal wars of aggression of the Axis Nations, have from time to time made declarations of their intentions that war criminals should be brought to justice.'

> "Never have the Allied Nations made any declaration about any war crimes other than those committed in the last of the wars ending with the destruction of Germany and the Surrender of Japan."

That this Tribunal was trying Petitioners for crimes which had never been declared to be such under the Constitution of the United States or pursuant to any international law or treaties is apparent from the statement made by the Chief Prosecutor regarding personal liability in his opening address:

> "The personal liability of these high-ranking civil officials is one of the most important, and perhaps the only new question under international law, to be presented to this Tribunal."

The admission that there is an absence of any international law to hold Petitioners personally responsible renders the entire judgment nugatory.

In the conduct of the trial itself, Petitioners were exposed to a relaxation of the rules of evidence and procedure such as has never been countenanced in any civilized national court in modern history. This was made possible by virtue of the Charter which was promulgated by General of the Army Douglas MacArthur under the direction of the Executive of the United States and military authorities. The International Military Tribunal for the Far East, in many instances by a majority opinion, admitted in evidence over objections and exceptions hundreds of documents consisting of *ex parte* affidavits, unsigned and unsworn statements, diary entries, newspaper reports, unofficial documents, hearsay statements of the second and third degrees, secondary evidence of the contents of the documents and unidentified reports. At one stage of the proceedings a long prosecution document stating the prosecution's version and interpretation of the contents of innumerable affidavits and reports was permitted to be introduced in evidence.

The Tribunal refused to call in witnesses at the request of the Petitioners, whose *ex parte* affidavits were admitted into evidence over objection and exception. The Tribunal on a number of occasions refused to call witnesses at the request of the Petitioners, who were reasonably expected to give testimony relevant and material to the defense of Petitioners. The Tribunal changed the rules of procedure after the prosecution had finished its case. The meaning of probative value which had been the test on the acceptance or rejection of the prosecution's documents was changed when the defense case commenced. As Mr. Justice PAL said:

> "I believe the view we took on the defense objection to prosecution evidence was preferable to that we subsequently took on the prosecution objection to the defense evidence."

Hundreds of documents offered by the defense which were of a similar nature to those offered by the prosecution, were rejected by the Tribunal, yet a very small number, perhaps less than twenty five of the documents of the prosecution were rejected. Many other instances of rulings resulting in prejudice could be related.

Other grounds supporting Petitioners' contention that these writs should be granted have not been briefed because of limitation of time. We invite the Court to examine and consider the companion petitions setting forth violations of Article 1, Section 9, Clause 8; Article 1, Section 8, Clause 14; Article 1, Section 9, Clause 3 and the Fifth and Sixth Amendments of the Constitution.

CONCLUSION

The relief requested by Petitioners in this and the companion petitions should be granted.

Dated, New York, December 14, 1948.

Respectfully submitted,

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APPENDIX "A"

Authority of General MacArthur as Supreme Commander for the Allied Powers

September 6, 1945

The text of a message transmitted on September 6 through the Joint Chiefs of Staff to General MacArthur follows. It was prepared jointly by the Department of State, the War Department and the Navy Department and approved by the President on September 6. The message is a statement clarifying the authority which General MacArthur is to exercise in his position as Supreme Commander for the Allied Powers.

"1. The authority of the Emperor and the Japanese Government to rule the State is subordinate to you as Supreme Commander for the Allied Powers. You will exercise your authority as you deem proper to carry out your mission. Our relations with Japan do not rest on a contractual basis, but on an unconditional surrender. Since your authority is supreme, you will not entertain any question on the part of the Japanese as to its scope.

"2. Control of Japan shall be exercised through the Japanese Government to the extent that such an arrangement produces satisfactory results. This does not prejudice your right to act directly if required. You may enforce the orders issued by you by the employment of such measures as you deem necessary, including the use of force.

"3. The statement of intentions contained in the Potsdam Declaration will be given full effect. It will not be given effect, however, because we consider ourselves bound in a contractual relationship with Japan as a result of that document. It will be respected and given effect because the Potsdam Declaration forms a part of our policy stated in good faith with relation to Japan and with relation to peace and security in the Far East."

APPENDIX "B"

Agreement of Foreign Ministers at Moscow on Establishing Far Eastern Commission and Allied Council for Japan, December 27, 1945

The Foreign Ministers of the Union of Soviet Socialist Republics, the United Kingdom, and the United States of America met in Moscow from December 16 to December 26, 1945, in accordance with the decision of the Crimea Conference, confirmed at the Berlin Conference, that there should be periodic consultation between them. At the meeting of the three Foreign Ministers, discussions took place on an informal and exploratory basis and agreement was reached on . . .

. . . . . .

Far Eastern Commission and Allied Council for Japan

A. *Far Eastern Commission*

Agreement was reached, with the concurrence of China, for the establishment of a Far Eastern Commission to take the place of the Far Eastern Advisory Commission. The terms of Reference for the Far Eastern Commission are as follows:

1. Establishment of the Commission.

A Far Eastern Commission is hereby established composed of the representative of the Union of Soviet Socialist Republics, United Kingdom, United States, China, France, the Netherlands, Canada, Australia, New Zealand, India, and the Philippine Commonwealth.

II. FUNCTIONS

A. The functions of the Far Eastern Commission shall be:

1. To formulate the policies, principles, and standards in conformity with which the fulfillment by Japan of its obligations under the Terms of Surrender may be accomplished.

2. To review, on the request of any member, any directive issued to the Supreme Commander for the Allied Powers or any action taken by the Supreme Commander involving policy decisions within the jurisdiction of the Commission.

3. To consider such other matters as may be assigned to it by agreement among the participating Governments reached in accordance with the voting procedure provided for in Article V-2 hereunder.

B. The Commission shall not make recommendations with regard to the conduct of military operations nor with regard to territorial adjustments.

C. The Commission in its activities will proceed from the fact that there has been formed an Allied Council for Japan and will respect existing control machinery in Japan, including the chain of command from the United States Government to the Supreme Commander and the Supreme Commander's command of occupation forces.

III. FUNCTIONS OF THE UNITED STATES GOVERNMENT

1. The United States Government shall prepare directives in accordance with policy decisions of the Commission and shall transmit them to the Supreme Commander through the appropriate United States Government agency. The Supreme Commander shall

be charged with the implementation of the directives which express the policy decisions of the Commission.

2. If the Commission decides that any directive or action reviewed in accordance with Article II-A-2 should be modified its decision shall be regarded as a policy decision.

3. The United States Government may issue interim directives to the Supreme Commander pending action by the Commission whenever urgent matters arise not covered by policies already formulated by the Commission; provided that any directives dealing with fundamental changes in the Japanese constitutional structure or in the regime of control, or dealing with a change in the Japanese Government as a whole will be issued only following consultation and following the attainment of agreement in the Far Eastern Commission.

4. All Directives issued shall be filed with the Commission.

IV. Other Methods of Consultation

The establishment of the Commission shall not preclude the use of other methods of consultation on Far Eastern issues by the participating Governments.

V. Composition

1. The Far Eastern Commission shall consist of one representative of each of the States party to this agreement. The membership of the Commission may be increased by agreement among the participating Powers as conditions warrant by the addition of representatives of other United Nations in the Far East or having territories therein. The Commission shall

provide for full and adequate consultations, as occasion may require, with representatives of the United Nations not members of the Commission in regard to matters before the Commission which are of particular concern to such nations.

2. The Commission may take action by less than unanimous vote provided that action shall have the concurrence of at least a majority of all the representatives including the representatives of the four following Powers: United States, United Kingdom, Union of Soviet Socialist Republics and China.

VI. Location and Organization

1. The Far Eastern Commission shall have its headquarters in Washington. It may meet at other places as occasion requires, including Tokyo, if and when it deems it desirable to do so. It may make such arrangements through the Chairman as may be practicable for consultation with the Supreme Commander for the Allied Powers.

2. Each representative on the Commission may be accompanied by an appropriate staff comprising both civilian and military representation.

3. The Commission shall organize its secretariat, appoint such committees as may be deemed advisable, and otherwise perfect its organization and procedure.

VII. Termination

The Far Eastern Commission shall cease to function when a decision to that effect is taken by the concurrence of at least a majority of all the representatives including the representatives of the four following Powers: United States, United Kingdom, Union of Soviet Socialist Repub-

lics and China. Prior to the termination of its functions the Commission shall transfer to any interim or permanent security organization of which the participating governments are members those functions which may appropriately be transferred.

It was agreed that the Government of the United States on behalf of the four Powers should present the Terms of Reference to the other Governments specified in Article I and invite them to participate in the Commission on the revised basis.

B. *Allied Council for Japan*

The following agreement was also reached, with the concurrence of China, for the establishment of an Allied Council for Japan:

1. There shall be established an Allied Council with its seat in Tokyo under the chairmanship of the Supreme Commander for the Allied Powers (or his Deputy) for the purpose of consulting with and advising the Supreme Commander in regard to the implementation of the Terms of Surrender, the occupation and control of Japan, and of directives supplementary thereto; and for the purpose of exercising the control authority herein granted.

2. The membership of the Allied Council shall consist of the Supreme Commander (or his Deputy) who shall be Chairman and United States member; a Union of Soviet Socialist Republics member; a Chinese member; and a member representing jointly the United Kingdom, Australia, New Zealand and India.

3. Each member shall be entitled to have an appropriate staff consisting of military and civilian advisers.

4. The Allied Council shall meet not less often than once every two weeks.

5. The Supreme Commander shall issue all orders for the implementation of the Terms of Surrender, the occupation and control of Japan, and directives supplementary thereto. In all cases action will be carried out under and through the Supreme Commander who is the sole executive authority for the Allied Powers in Japan. He will consult and advise with the Council in advance of the issuance of orders on matters of substance, the exigencies of the situation permitting. His decisions upon these matters shall be controlling.

6. If, regarding the implementation of policy decisions of the Far Eastern Commission on questions concerning a change in the regime of control, fundamental changes in the Japanese constitutional structure, and a change in Japanese Government as a whole, a member of the Council disagrees with the Supreme Commander (or his Deputy), the Supreme Commander will withhold the issuance of orders on these questions pending agreement thereon in the Far Eastern Commission.

7. In cases of necessity the Supreme Commander may take decisions concerning the change of individual Ministers of the Japanese Government, or concerning the filling of vacancies created by the resignation of individual cabinet members, after appropriate preliminary consultation with the representatives of the other Allied Powers on the Allied Council.

APPENDIX "C"

Apprehension, Trial and Punishment of War Criminals in the Far East (FEC Policy Decision, April 3, 1946)

1. The term "war crimes" as used herein, includes:

a. Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements and assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

b. Violations of the laws or customs of war. Such violations shall include but not be limited to murder, ill treatment or deportation to slave labor or for any other purpose of civilian population of, or in, occupied territory, murder or ill treatment of prisoners of war or persons on the seas, or elsewhere improper treatment of hostages, plunder of public or private property, wanton destruction of cities, towns or villages or devastation not justified by military necessity.

c. Murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war or prosecutions on political, racial or religious grounds in execution of or in connection with any crime defined herein whether or not in violation of the domestic law of the country where perpetrated.

2. The offense need not have been committed after a particular date to render the responsible party or parties subject to arrest but, in general, should have been committed since, or in the period immediately preceding the Muk-

den incident of September 18, 1931. The preponderance of cases may be expected to relate to the years since the Lukouchiao incident of July 7, 1937.

3. All practicable measures should be taken to identify, investigate, apprehend, and detain all persons suspected of having committed war crimes, as defined in paragraph 1. above, and all persons whom any one of the United Nations or Italy charges with such crimes.

4. Suspected war criminals should be held in close confinement, without access to the press or other media of public information, and without distinction as to rank or position, as befits ordinary criminals.

5. The Supreme Commander for the Allied Powers should have:

(a) power to appoint special international military courts (which term should be held to include tribunals of any type) composed of military, naval, or air force officers or civilians representing any two or more of the states members of the Far Eastern Commission for the trial under any applicable law, domestic or international, including the laws and customs of war, of the Far Eastern war criminals indicted by the Governments of these states, and

(b) power to prescribe, subject to consultation with the representatives of those governments, rules of procedure for such courts. The Supreme Commander shall appoint to each international court a judge nominated by each state represented on the Far Eastern Commission which signifies its desire to participate in the work of such court. In the appointment of the international courts and in all trials before them the international character of the courts and of

the authority by which they were appointed and under which they act should be properly emphasized and recognized, particularly in dealings with the Japanese people. The Supreme Commander for the Allied Powers should have, (1) the responsibility for carrying out the judgments of any international courts appointed by him; and (2) the power to approve, reduce or otherwise alter any sentences imposed by any such courts, but not to increase the severity thereof, after consultation with the Allied Council for Japan and the Representatives in Japan of the other Powers, members of the Far Eastern Commission.

6. The Supreme Commander for the Allied Powers (a) should promptly establish an agency, acting under his command to investigate reports of war crimes, to collect and analyze evidence, to arrange for the apprehension and prompt trial of suspects, to prepare, supervise and conduct the prosecution of individuals and organizations before international military courts or tribunals, and to recommend to the Supreme Commander which individuals and organizations should be prosecuted, before what courts they should be tried and what persons should be secured as witnesses, and (b) should provide, after discussion with the local representatives of the nations involved, and in a manner consistent with efficient administration, for equitable inclusion in the membership of such agency of suitable representatives of the States members of the Far Eastern Commission. This agency should advise the Supreme Commander and other Military commanders for the Allies on matters relating to war criminals. This agency should attach importance to the investigation of the evidence that offenses of the type described in paragraph 1 a above have been committed, should collect and analyze the evidence of such offenses and should recommend to the Supreme Commander a plan as indicated in paragraph 5 above for the

appointment of an international court for the trial of such offenses and the charges to be preferred. This agency should also maintain a central record and information office of Japanese war criminals and war crimes, the records and files of which should be available to any interested United Nation.

7. The military command of any nation (including the United States) participating in the occupation of areas previously dominated by Japan may establish special national military courts to deal with war criminals not held or requested by the Supreme Commander for trial by an international military court or tribunal of the types referred to in paragraph 6 above. Such courts should be separate from courts which may be set up to deal with current offenses against the occupation or infractions of military discipline.

8. Military commanders of forces of occupation in the Far East should promptly comply with a request by the government of any one of the United Nations or Italy for the delivery to it of any person who is stated in such request to be charged with a war crime, subject to the following exceptions:

(1) Persons who have held high political, civil or military positions in the Japanese Empire or in one of its allies, co-belligerents or satellites, should not be delivered, pending decision whether such person should be tried before an international military court or tribunal. Suspected war criminals desired for trial before such a court or tribunal or persons desired as witnesses at such trials will not be turned over to the nation requesting them so long as their presence is desired in connection with such trials.

(2) Where persons are requested by more than one of the Governments above-mentioned for trial of a war crime, the military commanders concerned should make their determinations based on all circumstances, including the relative seriousness of the respective charges against such a person and the national interests involved, and should deliver the requested person to a particular United Nation or Italy accordingly.

9. Compliance with any request for the delivery of a suspected war criminal should not be delayed on the ground that other requests for the same person are anticipated.

10. Delivery of a suspected war criminal to a requesting government should be subject to the condition that if such person is not brought to trial, tried and convicted within six months from the date he is so delivered, he will be returned to the authority who made delivery if he has been requested for trial by any of the other United Nations or Italy.

11. Military commanders should take under their control, pending subsequent decisions as to its eventual disposition, property, real and personal, found in areas of their respective jurisdiction and owned or controlled by persons taken into custody pursuant to the provisions of paragraph 3 above.

12. Such measures as are deemed necessary should be taken to insure that witnesses to war crimes will be available when required.

13. The execution of death sentences should be deferred if there is reason to believe that the testimony of those convicted would be of value in the trial of other war criminals.

14. Any national of any United Nation who may be requested, or who there is reason to believe may be desired, by his government as a renegade or quisling, should be arrested. Such persons should normally be turned over as soon as practicable to their government.

15. Military commanders having custody of alleged offenders requested under paragraphs 8 and 14 above, if in doubt as to whether such persons should be turned over to the demanding nation for trial, should consult their government and, in appropriate cases, leave the matter to be dealt with through diplomatic channels. Within the main islands of Japan, the Supreme Commander for the Allied Powers will have custody of such alleged offenders and should consult the Joint Chiefs of Staff in cases of doubt.

COPY (JCS 1512)

APPENDIX "D"

DRAFT

JOINT CHIEFS OF STAFF

Directive on the Identification, Apprehension and Trial of Persons Suspected of War Crimes

This directive is issued to you as Supreme Commander for the Allied Powers.

1. The term "war crimes" as used herein, includes:

A. Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

B. Violations of the laws or customs of war. Such violations shall include but not be limited to murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of, or in, occupied territory, murder or ill-treatment of prisoners of war or internees or persons on the seas or elsewhere, improper treatment of hostages, plunder of public or private property, wanton destruction of cities, towns or villages or devastation not justified by military necessity.

C. Murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war or persecutions on political, racial or religious grounds in execution of or in connection with any crime defined

herein whether or not in violation of the domestic law of the country where perpetrated.

2. The offense need not have been committed after a particular date to render the responsible party or parties subject to arrest, but in general, should have been committed since, or in the period immediately preceding the Mukden incident of September 18, 1931. The preponderance of cases may be expected to relate to the years since the Lukouchiao incident of July 7, 1937.

3. You will, in the areas subject to your jurisdiction, take all practicable measures to identify, investigate, apprehend and detain all persons whom you suspect of having committed war crimes as defined in paragraph 1, subparagraphs B and C above, and all persons whom any one of the United Nations or Italy notifies to you as being charged with such crimes. You will similarly apprehend and detain the persons deemed to be liable under paragraph 1.A. above, who are named in any list which may be sent to you by the United States National War Crimes Office and such other persons against whom you have probable cause for charging under paragraph 1.A. upon the basis of evidence available to you. In executing these tasks you will require from the Japanese such assistance as you deem necessary.

4. You will hold suspected war criminals in close confinement, without access to the press or other media of public information, and without distinction as to rank or position, as befits ordinary criminals.

5. As Supreme Commander for the Allied Powers, you have power (a) to appoint special international military courts (which term shall be held to mean tribunals of any kind), composed of military or naval officers or

civilians of two or more of the United Nations, for the trial, under any applicable law, domestic or international, including the laws and customs of war, of Far Eastern war criminals where the alleged offenders are, in the Supreme Commander's opinion, appropriately to be tried by an international court; and (b) to prescribe or approve rules of procedure for such tribunals. The appointment of any such international court will be discussed by the Supreme Commander or his designated representative in advance with the appropriate local officers or representatives of each nation to be represented upon such a court and fair arrangements will be made for appropriate representation of each such nation upon the Court. No such officer or civilian will be appointed to serve upon such a court without the approval of the local commander of the forces of his nation or such other official as any nation may prescribe to give such approval for its own nationals. In the appointment of any such international court and in all trials before it *the international character of the court and of the authority by which it is appointed should be properly recognized and emphasized, particularly in dealings with the Japanese people. Until further authorization by the Joint Chiefs of Staff, no international court for the trial of persons charged with offenses of the type described in paragraph 1.A. above will be established by the Supreme Commander.* In submitting any plan for the appointment of such a court, you should specify the particular offenses and alleged offenders to be tried before the court and the nature of the coordination of the plan effected by you on a military level with representatives of the nations to be represented upon the court.

6. You will have (a) the responsibility for carrying out the judgments of any international courts or tribunals and (b) the power to approve, reduce or otherwise alter

any sentence imposed by such a court or tribunal, but not to increase the severity thereof.

7. You may authorize the military command of any nation participating in the occupation of Japan, including the United States, to establish special military courts to deal with war criminals not held or requested by you for trial before an international court or tribunal. Such courts should be separate from courts which may be set up to deal with current offenses against the occupation or infractions of military discipline.

8. Subject to the provisions of paragraph 16, you will promptly comply with a request by the Government of any one of the United Nations or Italy for the delivery to it of any person who is stated in such request to be charged with a war crime, subject to the following exceptions:

(1) Persons who have held high political, civil or military positions in the Japanese Empire or in one of its allies, co-belligerents or satellites, will not be delivered, pending decision whether such persons should be tried before such tribunal, or persons desired as witnesses at trials before the tribunal, will not be turned over to the nation requesting them so long as their presence is desired in connection with such trials.

(2) Where persons are requested by more than one of the Governments above mentioned for trial of a war crime, you will make your own determination based on all the circumstances, including the relative seriousness of the respective charges against such a person and the national interests involved, and will deliver the requested person to a particular United Nation or Italy accordingly.

9. Compliance with any request for the delivery of a suspected war criminal should not be delayed on the ground that other requests for the same person are anticipated.

10. Delivery of a suspected war criminal to a requesting government shall be subject to the condition that if such person is not brought to trial, tried and convicted within six months from the date he is so delivered, he will be returned to you if requested for trial by any of the other United Nations or Italy.

11. You will take under your control, pending decision by higher authorities as to its eventual disposition, property, real and personal, found in areas subject to your jurisdiction and owned or controlled by persons taken into custody pursuant to the provisions of paragraph 3 above.

12. You will take such measures as you deem necessary to insure that witnesses to war crimes will be available when required.

13. The execution of death sentences should be deferred when you have reason to believe that the testimony of those convicted would be of value in the trial of other war criminals.

14. You will arrest any national of a United Nation who is requested, or whom you believe may be desired, by his government as a renegade or quisling. Subject to the provisions of paragraph 16, such persons should normally be turned over as soon as practicable to their government.

15. You should (a) promptly establish an agency, acting under your command, to investigate reports on war crimes and to collect and analyze evidence, to arrange for the apprehension and prompt trial of suspects, to prepare,